

**NO. 48821-3**

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ADAM DIAZ, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable K.A. van Doorninck

No. 15-1-01288-8

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did a double jeopardy violation occur when the first trial court declared a mistrial after the jury had been deliberating for over twice the length of the presented testimony, each individual juror stated they were unable to reach a verdict in a reasonable amount of time, and the judge observed that the jurors appeared tired and frustrated? (Appellant's Assignment of Error No. 1-8)
2. Should this court exercise its discretion in imposing appellate costs when the defendant is 23 years of age, able-bodied and received a sentence of less than two years in custody? (Appellant's Assignment of Error No. 9)

B. STATEMENT OF THE CASE.

1. Procedure

On April 1, 2015, Adam Christopher Diaz, hereinafter "defendant" was charged by information with possession of stolen property in the first degree, three counts of criminal trespass in the first degree, and driving with a license suspended in the first degree. CP 52-54. An amended information charged the defendant with an additional count of failure to have an ignition interlock device. CP 55-59.

On July 23, 2015, the parties appeared for jury trial. 7/23/15 RP 1. No testimony was taken on July 23, 2015. On July 24, 2015, a CrR 3.5 hearing was held. 7/24/15 RP 17. At the conclusion of the CrR 3.5 hearing, the trial court found that the defendant's statements to police were admissible. 7/24/15 RP 35. The same day, the trial court called for a jury panel and a jury was sworn. CP 68-74.

On July 27, 2015, the next court day, the defendant failed to appear and a bench warrant was issued. *Id.* The defendant appeared in custody at 3:01 pm and opening statements were given. *Id.* On July 29, 2015, testimony was taken from Officer Albert Schultz, Annie Kimani, Dennis Gunnarson, Sunya Grantham, Officer Kevin Lorberau, Kurt Trettin, Gloria Goodman, Susan Pierre, and Valerie Anundson. *Id.* On August 3, 2015, the State called witnesses Jenny Black and Detective Castora Hayes. *Id.* The same day, the defendant called witness Clarence Diaz. *Id.* Closing argument was given by the State at 10:40 am on August 3, 2015. *Id.* Closing argument by the defense was given at 11:02 am. *Id.* The jury began deliberating at 11:34 am and continued deliberating until 3:58 pm. *Id.* During the afternoon session of deliberations, the jury sent out a question, asking if they could see a photograph of the ignition interlock

device. CP 75; 8/4/15 RP<sup>1</sup> 4. The court responded to the question with the answer “please review your instructions.” *Id.* Before the first question could be answered, the jury sent out a second question, asking “What was the oath we took as jurors? Could we please have a copy for review.” CP 76; 8/4/15 RP 3-5. Initially, the court proposed providing the jury with a copy of the oath, but the defendant objected. 8/4/15 RP 3. The defendant did not object to the jury being brought out into the courtroom and the judge reading them the oath, which was done. 8/4/15 RP 3-5. Both answers were given to the jury at approximately 9:19 am. *Id.*

At 10:33 am, slightly more than an hour later, a juror reported to the court that another juror had gone to the scene of the pawn shop in the case. 8/4/15 RP 8. The offending juror was also questioned and all parties agreed that deliberations could continue. 8/4/15 RP 8-16

At 4:03 pm, the jury sent out another note this time stating “We’ve reached a verdict on five counts but are at a stalemate on one. What is the procedure?” CP 77; 8/4/15 RP 18. The entire jury was brought into open court. 8/4/15 RP 19. Each jury was individually asked if they believed they would be able to reach a verdict on the remaining count within a

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<sup>1</sup> There appear to be two different versions of the VRP from 8/4/15, both numbered differently and containing different formatting, although the content is the same. For ease reference, the State is using the same version as the defendant and has attached those VRPs to its brief for ease of reference.

reasonable time. 8/4/15 RP 19-20. Each juror indicated that they did not believe they could reach a verdict in a reasonable time. *Id.*

Defense counsel requested that the jury be asked to return the following day to see if they could reach a verdict. 8/4/15 RP 22. The court then indicated that the jury seemed “really frustrated and tired” and was concerned that there was no reasonable probability of a verdict on the remaining count. 8/4/15 RP 23. The trial court took a recess and reviewed the exhibit list and background information. 8/4/16 RP 23. The court found that the jurors had “fleshed through the evidence thoroughly” and did not believe that the jurors would be able to reach a verdict as to the remaining count. 8/4/15 RP 23-24. The jury then delivered verdicts on counts II-VI. 8/4/15 RP 24-26.

The defendant filed a notice of appeal regarding convictions for counts II-VI on September 25, 2015. That case was litigated at the Court of Appeals, which affirmed those convictions on November 8, 2016.

On February 1, 2016, the parties appeared before the court for a motion for a continuance regarding count I, which had been amended to possession of stolen property in the second degree. CP 8. At no time did defendant raise a double jeopardy claim. The case was sent to trial on February 2, 2016. 2/2/16 RP 16. At no time did the defendant raise a double jeopardy claim before the second trial court.



The retrial was held on February 2-4, 2016<sup>2</sup>. At the conclusion of the retrial, the defendant was found guilty of possession of stolen property in the second degree. CP 31. The defendant was sentenced on February 9, 2016. CP 34-46. The defendant did not raise a double jeopardy claim at sentencing. He filed a timely notice of appeal. CP 47.

The State moved to strike the defendant's opening brief, asserting that the assignments of error applied to alleged errors that occurred in the defendant's first trial, from which he already had direct review<sup>3</sup>. This court, however, denied the State's motion, holding that, under *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 135, 750 P.2d 1257 (1988), the defendant was permitted to challenge a ruling granting a mistrial as part of an appeal of a retrial. *See* Ruling by Commissioner Bearse, 12/21/16.

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<sup>2</sup> The only issues raised by the defendant's opening brief are related to his double jeopardy claim and appellate costs. He assigns no error to anything that occurred in the second trial. Therefore, the State does not include a statement of facts relating to the second trial in its response brief.

<sup>3</sup> The State maintains that the defendant should have been required to raise the double jeopardy claim in his direct appeal from his first trial. In this case, which is the retrial of count I, the defendant does not raise any alleged errors committed by the trial court. The defendant did not ask the judge presiding over his retrial for any ruling regarding his double jeopardy claim. The defendant is attempting to reach back into his first trial and litigate matters which had already been subject to appellate review. Furthermore, the case relied upon by Commissioner Bearse, *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 135, 750 P.2d 1257 (1988), is a civil case that is distinguishable from the current case. The defendant in the case at bar, unlike *Adkins*, already had a direct appeal as a matter of right where such an issue could have been raised.

C. ARGUMENT.

1. NO DOUBLE JEOPARDY VIOLATION OCCURRED WHEN THE FIRST TRIAL COURT DISCHARGED THE JURY AFTER THEY HAD BEEN DELIBERATING FOR OVER TWICE AS LONG AS THE PRESENTED TESTIMONY, EACH JUROR INDIVIDUALLY INDICATED THAT THEY WERE UNABLE TO REACH A VERDICT IN A REASONABLE AMOUNT OF TIME, AND AFTER THE JUDGE NOTED THAT THE JURORS APPEARED TO BE TIRED AND FRUSTRATED.

The Double Jeopardy Clause of the United States Constitution provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” *U.S. Const. amend. 5*. The Washington State Constitution provides that “[n]o person shall be ... twice put in jeopardy for the same offense.” *Const. art. I, § 9*. Washington’s clause provides the same protection as the federal clause. *In re Pers. Restraint of Davis*, 142 Wn.2d 165, 171, 12 P.3d 603 (2000). The standard of review for a double jeopardy claim is de novo. *State v. O’Brien*, 164 Wn. App. 924, 267 P.3d 422 (2011).

Jeopardy attaches in a jury trial when the jury is sworn and terminates with a verdict of not guilty. *State v. Corrado*, 81 Wn. App. 640, 645-646, 915 P.2d 1121 (1996). However, a retrial following a trial in which the jury was unable to agree does not terminate double jeopardy because retrial is an instance of continuing jeopardy. *Richardson v. U.S.*, 468 U.S. 317, 324, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984). A jury being

unable to agree is a classic basis for a mistrial. *State v. Glasmann*, 183 Wn.2d 117, 349 P.3d 829 (2015), *cert. denied*, 136 S. Ct. 357 (2015).

A trial court has the discretion to declare a mistrial without terminating jeopardy where there is a manifest necessity for the mistrial, or the ends of public justice would otherwise be defeated. *State v. Graham*, 91 Wn. App. 663, 960 P.2d 457 (1988), *citing State v. Eldridge*, 17 Wn. App. 270, 276, 562 P.2d 276 (1977), *review denied*, 89 Wn.2d 1017 (1978). Manifest necessity exists when “extraordinary and striking circumstances exist that indicate substantial justice cannot be obtained without discontinuing the trial”. *State v. Juarez*, 115 Wn. App. 881, 886, 64 P.3d 83 (2003), *citing State v. Jones*, 97 Wn.2d 159, 164, 641 P.2d 708 (1982). Factors a judge should consider should include the length of deliberations in light of the length of the trial, and the volume and complexity of the evidence. *State v. Kirk*, 64 Wn. App. 788, 793, 828 P.2d 1128, *review denied*, 119 Wn.2d 1025 (1992).

Great deference should be accorded by a reviewing court to a trial court’s determination to declare a mistrial when he or she considers a jury to be deadlocked. *State v. Jones*, 97 Wn.2d 159, 641 P.2d 708 (1982), *State v. Melton*, 97 Wn. App. 327, 983 P.2d 699 (1999). There are several factors for determining whether a trial judge properly exercised its discretion in granting a mistrial for a manifest necessity. *Id.* at 332. They include: (1) whether the trial court acted precipitately or gave both defense counsel and the State a full opportunity to explain their positions, (2)

whether the trial court accorded careful consideration to the defendant's interest in having a single proceeding, and (3) whether the trial court considered alternatives to declaring a mistrial. *Id.*, see also, *United States v. Jorn*, 400 U.S. 470, 487, 91 S. Ct. 547, 558, 27 L. Ed. 2d 543 (1971).

In this case, the trial court properly exercised its discretion in declaring a mistrial when the jury was hopelessly deadlocked. In the first trial, testimony started on July 29, 2015 at 9:19 am until 11:29 am. CP 68-74. Testimony resumed at 1:16 pm and concluded at approximately 2:30 pm. *Id.* The next trial day was August 3, 2015. *Id.* That day, testimony began at 9:14 am and concluded at 10:08 am. *Id.* In total, there was approximately four hours of testimony. CP 68-74.

The jury began deliberating at 11:34 am on August 3<sup>rd</sup>. They were excused for lunch from 12:06 pm until 1:00 pm. They concluded deliberations for the day at 3:58 pm. *Id.* In total, on August 3<sup>rd</sup> they deliberated for approximately three and one half hours. On August 4<sup>th</sup>, the jury began deliberating at 8:50 am, until lunch at 11:55 am. *Id.* They resumed deliberations at 1:05 pm until 3:41 pm, at which point they indicted they were deadlocked. *Id.* In total, on August 4<sup>th</sup> the jury deliberated for approximately five and one half hours. *Id.*

This was a case in which approximately four hours of testimony was presented and the jury deliberated for nine hours. The nature of the evidence presented was not complex or scientific in nature. It is clear that the trial judge acted reasonably given the nature of the evidence and the

length of the trial in relation to the length of deliberations. This jury deliberated for a period of time twice as long as the presented testimony.

Despite the defendant's assertion to the contrary, the judge did engage in a deliberate and thoughtful decision to discharge the jury. First, he inquired of each juror as to whether there was a reasonable possibility of reaching a verdict in a reasonable amount of time. 8/4/15 RP 19-20. Each juror indicated that there was not. *Id.* The judge, who was filling in for the judge who presided over the trial, then asked the attorneys how long the testimony was in the case—clearly in an effort to assess the length of the case relative to how long the jury had been deliberating. 8/4/15 RP 21-23. He gave each attorney an opportunity to be heard. 8/4/15 RP 22-23. The court stated:

I'm going to take a brief recess and think about it. I am concerned that there is no reasonable probability of them reaching a verdict on that last count. They seem really frustrated and tired, and the little bit I know about this case is it's a pretty straightforward case. I mean, this isn't the French connection. And so it also seems, at least at first blush, that they've had adequate time to deliberate, but I'm going to take a brief recess, do a little research, then I'll come right back.

8/4/15 RP 23.

The judge returned after his recess and made a finding that the jury was deadlocked, that they reached verdicts on five counts and had reviewed the evidence thoroughly. 8/4/15 RP 23-24. It is clear from the court's ruling that he gave the parties an opportunity to be heard and

explain their positions and accorded careful consideration to the defendant resolving his case in a single proceeding. The trial court had no other alternatives available in this case, where the jurors each proclaimed that they were deadlocked after deliberating for over twice as long as the entire presentation of evidence. The only alternative available—and the only one suggested by the defendant in his opening brief—was to continue deliberations. The “alternative” would merely have been to maintain the status quo, which the jurors indicated was pointless. Moreover, the judge took into account the jury’s physical appearance—and he was in the best position to do so because he was there observing the jurors. The judge noted that the jurors appeared tired and “really frustrated.” 8/4/15 RP 23.

Given the length of the trial as it related to the length of deliberations, the answers that each juror gave regarding the fact that they were deadlocked, the fact that they sent out multiple questions and had reached verdict on five counts, and appeared tired and frustrated, it was reasonable for the court to find a manifest necessity and declare a mistrial. For all of the above stated reasons, this court should find that the defendant’s first jury was properly discharged as to count I as the jury was hopelessly deadlocked. Therefore, the defendant’s double jeopardy claim, which he raises for the first time on appeal, fails.

2. APPELLATE COSTS ARE APPROPRIATE IF THIS COURT AFFIRMS THE DEFENDANT’S JUDGMENT WHEN THE DEFENDANT IS 23 YEARS OF AGE, ABLE-BODIED AND RECEIVED A SENTENCE OF LESS THAN TWO YEARS IN CUSTODY.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. *State v. Blank*, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997). As the Court pointed out in *State v. Sinclair*, 192 Wn. App. 380, 612-613, 367 P.3d 612, *review denied*, 185 Wn.2d 1034 (2016), the award of appellate costs to a prevailing party is within the discretion of the appellate court. *See also* RAP 14.2; *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000).

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In 1976<sup>4</sup>, the Legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. *Id.* In *State v. Barklind*, 87 Wn.2d 814, 557 P.2d 314 (1977), the Supreme Court held that requiring a defendant to contribute toward paying for appointed counsel under this statute did not violate, or even “chill” the right to counsel. *Id.*, at 818.

In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs. In *Blank*, *supra*, at 239, the Supreme

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<sup>4</sup> Actually introduced in Laws of 1975, 2d Ex. Sess. Ch. 96.

Court held this statute constitutional, affirming this Court's holding in *State v. Blank*, 80 Wn. App. 638, 641-642, 910 P.2d 545 (1996).

*Nolan*, 141 Wn.2d 620, noted that in *State v. Keeney*, 112 Wn.2d 140, 769 P.2d 295 (1989), the Supreme Court found the imposition of statutory costs on appeal in favor of the State against a criminal defendant to be mandatory under RAP 14.2 and constitutional, but that "costs" did not include statutory attorney fees. *Keeney*, at 142.


Here, the defendant appeared to be able-bodied and capable of working. He is only 23 years of age and a relatively short sentence of less than two years on this charge. Any assertion that the defendant cannot and will never be able to pay appellate costs is belied by the record. Therefore, this court should properly exercise its discretion in determining whether to impose appellate costs.

D. CONCLUSION.

For the above stated reasons, this court should affirm the defendant's conviction below.

DATED: January 20, 2017.

MARK LINDQUIST  
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Prosecuting Attorney

  
MICHELLE HYER  
Deputy Prosecuting Attorney  
WSB # 32724



Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

## **APPENDIX “A”**

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

---

STATE OF WASHINGTON,	)	Court of Appeals
Plaintiff,	)	No. 48821-3-II
v.	)	
ADAM DIAZ,	)	Superior Court
Defendant.	)	No. 15-1-01288-8

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VERBATIM TRANSCRIPT OF PROCEEDINGS  
Jury Questions  
August 4, 2015

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1 BE IT REMEMBERED that on Tuesday, August 4,  
2 2015, at 930 Tacoma Avenue South, Tacoma, Washington,  
3 Courtroom 822, before JUDGE FRANK E. CUTHBERTSON, the  
4 following proceedings were had, to wit:

5

6

\* \* \* \* \*

7

P R O C E E D I N G S

8

(Commenced 9:11 a.m.)

9

10 THE COURT: Good morning, I'm Judge Cuthbertson.  
11 I think I know everyone here. I don't know the defendant.  
12 I'm here for Judge van Doorninck today.

13 Yesterday afternoon there was a question from the  
14 jury. The question reads:

15 Can we see a picture of an interlock device?

16 I've had an opportunity to consult with Judge van  
17 Doorninck, and my proposed response would be to: Review  
18 your instructions again.

19 And I'll hear from Mr. Harlass and Mr. Williams on  
20 that.

21 MR. HARLASS: Your Honor, I have no objection to  
22 that response. Obviously, we can't give them pictures.

23 MR. HENDERSON: No. That's the appropriate  
24 response, Your Honor.

25 THE COURT: Okay. The second question which came

## JURY QUESTION

1 out this morning early, I guess moments ago, was -- and I'll  
2 read the question:

3 What was the oath we took as jurors?

4 Could we please have a copy for review?

5 Again, after consulting with Judge van Doorninck,  
6 it's my intent to give them a copy of the oath of jurors,  
7 and I'll give you a copy to take a look at. I think that's  
8 public record. I don't think it's in any way prejudicial or  
9 a comment on the evidence. It may be helpful.

10 Is there any objection, at this time, to a copy of  
11 the oath being provided to the jurors?

12 MR. HARLASS: Your Honor, the State has no  
13 objection. I agree with the Court that it's not a comment  
14 on the evidence, and I don't think it would be prejudicial.

15 THE COURT: Thank you.

16 Counsel for the defense.

17 MR. HENDERSON: Your Honor, I guess, you know, I  
18 would make an objection only because in the jury room, I  
19 think they need only what they have in terms of what the  
20 evidence is and their jury instructions. They did  
21 previously take the oath. But I guess in abundance of  
22 caution, I would like to make that objection.

23 THE COURT: Would any concerns you have be  
24 obviated by bringing them out and me reading the oath to  
25 them?

## JURY QUESTION

1 MR. HENDERSON: Yes. I think that would be fine,  
2 yes.

3 THE COURT: Why don't we bring them out, please,  
4 and we'll do that.

5 (Jury present)

6 Good morning. Please be seated. My name is Judge  
7 Frank Cuthbertson. I'm sitting in today for Judge van  
8 Doorninck, who had other responsibilities at Remann Hall,  
9 which is our juvenile court. She'll be back later this  
10 afternoon, but I'm sitting in this morning for her.

11 Who is the presiding juror, please?

12 Okay. Good morning.

13 JUROR NO. 4: Good morning.

14 THE COURT: I'm going to ask that no one say  
15 anything about any vote that's been taken or how the -- what  
16 it is at this point, but I wanted to address the question  
17 that came out yesterday and the question that came out this  
18 morning.

19 As to the question yesterday, "Can we see a  
20 picture of an interlock device?" my order -- my response is:  
21 Please review your instructions that you've been given.  
22 Okay.

23 As to the question that came out this morning,  
24 "What was the oath we took as jurors? Could we please have  
25 a copy for review?" the lawyers and I have agreed that I

## JURY QUESTION

1 will re-read the oath to you, and I'm going to do that at  
2 this time. And it reads as follows:

3           You and each of you do solemnly swear  
4           that you will well and truly try the issue  
5           joined between the State of Washington and  
6           Adam Diaz, defendant, and a true verdict  
7           render according to the evidence and the  
8           instructions of the Court.

9           And that's the oath of jurors that you took.  
10 Okay.

11           Thank you very much. Please return to the jury  
12 room and continue deliberating. Thank you.

13           (Jury absent) (Off the record 9:19 a.m.)

14                           \* \* \* \* \*

15           (Back on the record 10:33 a.m.)

16           THE COURT: Counsel, it's my understanding there  
17 may be an issue with one of the jurors. I intend to bring  
18 out the presiding juror and *voir dire* the presiding juror.  
19 I understand that one of the jurors may have intentionally,  
20 or inadvertently, done a view of a pawn shop that was at  
21 issue in this particular case, and so at this time, I'll  
22 hear from Counsel. My plan is to bring out the presiding  
23 juror, ask her what happened, what was revealed, allow you  
24 to *voir dire* her. After that I would bring out the juror in  
25 question and *voir dire* that person, and then we can talk

## JURY QUESTION

1 about our options.

2 Does that work?

3 MR. HENDERSON: Yes, Your Honor.

4 MR. HARLASS: The State --

5 THE COURT: Mr. Henderson, if I call you  
6 Mr. Williams again, just throw something at me. I'm sorry.  
7 Mr. Harlass.

8 MR. HARLASS: The State agrees with the Court. I  
9 think bringing out the presiding, first, would be a best  
10 course of action. I just want to make sure that no  
11 information -- that they're told up front that we don't want  
12 any information about --

13 THE COURT: Votes.

14 MR. HARLASS: -- about votes, or their viewpoints  
15 on evidence, or anything like that.

16 THE COURT: Of course. Thank you.  
17 I believe we're ready for the juror.

18 MR. HENDERSON: Your Honor, just one more detail.

19 THE COURT: Hold on a second, please.

20 MR. HENDERSON: One more detail. If we can make  
21 sure that they don't go back and let everyone else know what  
22 they were asked in here.

23 THE COURT: Yes. Thank you.

24 (Juror No. 4 present)

25 Good morning.



## JURY QUESTION

1 THE JUROR: Good morning.

2 THE COURT: Let me lay out a couple of ground  
3 rules before we get started. I want to ask you, and the  
4 lawyers want to ask you, some questions about the  
5 deliberations. However, first, I want to -- you're an  
6 officer of the Court, so I get to order you to do things.

7 THE JUROR: Certainly. I'm a military wife. I'm  
8 used to it.

9 THE COURT: Okay. You're used to it.

10 No. 1, please don't say anything about how the  
11 deliberations are going, who is voting what way, what the  
12 vote is, if there have been votes or anything like that.

13 THE JUROR: Okay.

14 THE COURT: Second, I'm going to ask that you  
15 please not discuss with your fellow jurors any of the  
16 questions that we pose to you, or any of the stuff that we  
17 talk about at this point.

18 THE JUROR: Certainly.

19 THE COURT: And you'll just have to tell them that  
20 the judge says, I can't talk about it.

21 THE JUROR: I can't talk. Okay.

22 THE COURT: Now, it's my understanding that one of  
23 the jurors may have disclosed that they went to a scene or  
24 went by a location at issue in this trial. Is that correct?

25 THE JUROR: That is correct.

## JURY QUESTION

1 THE COURT: Without saying who voted, or anything  
2 about that, the status of the deliberations, can you tell me  
3 what was said by whom and who may have heard it.

4 THE JUROR: By whom?

5 THE COURT: Yes.

6 THE JUROR: Juror No. 5.

7 THE COURT: Okay.

8 THE JUROR: He said, I went past the pawn shop on  
9 96th and Tacoma.

10 THE COURT: Ah-hah.

11 THE JUROR: And the reply from everybody else in  
12 the jury was, we were instructed not to go anywhere near any  
13 of the --

14 THE COURT: Locations.

15 THE JUROR: -- locations. We have to report this  
16 to the judge.

17 I got up knocked on the door and reported it.

18 THE COURT: Okay. Did he indicate anything that  
19 he observed at that location, or did he comment on the  
20 location, other than to say that he went past the pawn shop  
21 on 92nd in Tacoma?

22 THE JUROR: He said that there were several pawn  
23 shops on 92nd and Tacoma.

24 THE COURT: And it sounds like -- and I want to  
25 get it straight -- that folks told him that that was

## JURY QUESTION

1 inappropriate.

2 THE JUROR: Yes.

3 THE COURT: Or indicated their displeasure with  
4 that, and you indicated that you would talk to the Court.

5 THE JUROR: Yes.

6 THE COURT: Okay. Thank you.

7 Mr. Harlass, questions for the presiding juror?

8 MR. HARLASS: Yes, just one.

9 Were all 12 of you sitting around the table when  
10 this was said?

11 THE JUROR: Yes, sir.

12 MR. HARLASS: I have no other questions.

13 THE COURT: Thank you.

14 Mr. Henderson.

15 MR. HENDERSON: Actually, I think that would have  
16 been my question, was everyone present, but I think a  
17 follow-up question would be, Madam Juror, was there any  
18 other discussion, other than Juror No. 5 telling about  
19 several pawn shops? Did any other jurors make any -- was  
20 there any discussion back and forth?

21 THE JUROR: Absolutely not. The discussion was we  
22 had been instructed you can't talk about that. We were  
23 instructed not to. I have to report this to the judge.

24 MR. HENDERSON: I don't have any other questions.

25 THE COURT: Juror 4, I'm going to ask you --

## JURY QUESTION

1 excuse me. Presiding juror, I'm going to ask you to return  
2 to the jury room and, please, don't discuss anything that we  
3 talked about. Thank you. We really appreciate your service  
4 as presiding juror.

5 (Juror No. 4 exits the courtroom)

6 I believe we're ready for Juror 5.

7 MR. HARLASS: If I could just ask the Court, did  
8 she say 92nd?

9 THE COURT: 92nd and Tacoma Avenue.

10 (Juror 5 present)

11 Juror 5, good morning. Juror 5, I wanted to -- we  
12 want to ask you some questions about discussions back in the  
13 jury room, but there are a couple of ground rules I need to  
14 lay out.

15 First, please do not discuss what the votes have  
16 been, where folks are at, where the deliberations are at  
17 and -- anything like that, please.

18 THE JUROR: Okay.

19 THE COURT: Second, we're going to ask you some  
20 questions, and I'm going to ask or order that you please not  
21 discuss any of the things that we talk about out here with  
22 folks back there -- with your fellow jurors.

23 THE JUROR: Okay.

24 THE COURT: So, it's my understanding that you  
25 indicated to your fellow jurors that you had been by a

## JURY QUESTION

1 location that was at issue -- that was at issue in this  
2 case, which was at 92nd Street in Tacoma.

3 THE JUROR: Near 92nd Street, not exactly on 92nd  
4 Street.

5 THE COURT: Can you tell us what you said to them?

6 THE JUROR: Well, I barely got the sentence out,  
7 and I didn't get to complete my sentence before the  
8 deliberations ever started, before the first -- in fact,  
9 before the first word of testimony was started, we were  
10 talking and I said, you know, I'm an authority on -- can I  
11 say pawn shops? Not that I've -- I'm running around pawning  
12 stuff, I'm looking for an electric acoustical left-handed  
13 guitar. 12 percent of the people in the world are  
14 left-handed, and probably less than one percent actually  
15 play a guitar. So you can imagine the factories are not  
16 exactly fired up to turn out left-handed guitars, and I've  
17 had a hard problem finding them. I've found some cheap  
18 ones, but I'm looking for a particular one. So I must have  
19 been, you know, in the last year that I've been looking,  
20 probably safe to say I've been to 100 pawn shops, and none  
21 of them had one. They say occasionally they do, but they're  
22 very rare.

23 And so as I do every day, and I have done every  
24 day, I see a pawn shop. If it's convenient for me to whip  
25 in there, I do, and I look. And I -- I was gonna tell this

## JURY QUESTION

1 morning -- my phrase was, once again: Yesterday I was out  
2 checking -- oh, you can't be investigating. I'm not  
3 investigating. I didn't know there was a ban on me just  
4 because, you know, the word was mentioned in testimony here,  
5 that I couldn't continue to look for a left-handed guitar.  
6 And there were 14, that I know of, establishments from 92nd  
7 Street down to 98th, and I'm sure I didn't see them all, and  
8 that's -- I was just gonna report, kind of as a joke. Once  
9 again I struck out, but how they think that there would  
10 be -- well, to categorize as a word that I've done something  
11 illegal here, I don't think I have.

12 THE COURT: Yeah. And the -- the concern is that  
13 we want to make sure that jurors base any decision that they  
14 make solely on the law and solely on the facts that are  
15 produced in court, both the evidence that's admitted, as  
16 well as the testimony that comes from the witness stand, and  
17 that's it. My concern as a judicial officer is if there's  
18 outside investigation and everybody in the jury room's not  
19 on the same playing field. And so our instructions will  
20 periodically say that, and I think that similar things were  
21 probably said in this case.

22 I often ask people if they're going by a location  
23 that's mentioned, to let us know, let the judicial assistant  
24 know. And so I don't want to belabor this, but I want to be  
25 absolutely clear on the statement and the reactions.

## JURY QUESTION

1                   So everybody's at the table. Is that right?

2                   THE JUROR: This was -- we were getting coffee,  
3                   milling -- this was before we started our deliberations.

4                   THE COURT: Okay. So -- but everybody was in the  
5                   room.

6                   THE JUROR: I couldn't swear to that -- well, I  
7                   mean, everybody was -- might have been in the bathroom. I  
8                   don't know.

9                   THE COURT: Okay. Well, then describe to me how  
10                  this went play-by-play.

11                  THE JUROR: Okay. Come in, sit down, everybody's  
12                  kind of milling around. We hadn't started any type of  
13                  discussion. I mention I went to a pawn shop yesterday  
14                  afternoon, and I said on 92nd Street, you know, and it's on  
15                  my way home. It's not like I drove out of the way. And I  
16                  started to say "looking for a guitar" because I've belabored  
17                  everybody in there with, hey, if you run across one, let me  
18                  know. But they cut me off right there: We can't  
19                  investigate. I can't investigate a guitar.

20                  THE COURT: And that's how we got here.

21                  THE JUROR: Yeah.

22                  THE COURT: Did anybody talk any more about pawn  
23                  shops, anything like that?

24                  THE JUROR: No. No, that was it.

25                  THE COURT: That was it.

## JURY QUESTION

1 Mr. Harlass, any questions?

2 MR. HARLASS: I don't have any questions.

3 THE COURT: Mr. Henderson.

4 MR. HENDERSON: I don't have any questions based  
5 on that, Your Honor.

6 THE COURT: Thank you.

7 Juror 5, I'm going to ask you to go back in the  
8 back.

9 THE JUROR: Okay.

10 THE COURT: And please don't discuss any of the  
11 questions. And you just have to tell them you're under my  
12 order not to say anything about anything that we talked  
13 about out here in open court. Thank you so much.

14 THE JUROR: You're welcome.

15 (Juror No. 5 absent)

16 THE COURT: Mr. Harlass.

17 MR. HARLASS: I think case law has carved out a  
18 technical misconduct that has no prejudicial effect,  
19 especially when it's not really inserting new facts. And I  
20 know Your Honor wasn't the judge sitting for the facts, but  
21 if I say something different than Mr. Henderson's  
22 understanding, please correct me.

23 In this case, Mr. Diaz had said he bought this  
24 watch at 96th and South Tacoma way at a pawn shop they went  
25 to. 96th and South Tacoma Way, there was no pawn shop at



## JURY QUESTION

1 that specific -- on cross-examination, Mr. Henderson asked:

2 Did you visit other pawn shops in the area?

3 THE COURT: Asked law enforcement?

4 MR. HARLASS: Yes, the detective, and the answer  
5 to that question was "yes."

6 So it was never really disputed that there are not  
7 other pawn shops in the area. And it sounds like here, it's  
8 at 92nd and Tacoma. So I don't know if he's really  
9 inserting any new information. And although it does sound  
10 like it's technical misconduct, I'm not sure what the  
11 Defense's position is on whether we need to proceed into a  
12 prejudice finding by individually questioning the jurors, or  
13 whether based upon the -- that statement, the Court would  
14 feel comfortable making a non-prejudice finding at this  
15 time. But the State's position is it's technical misconduct  
16 and it doesn't sound like it would affect deliberations, but  
17 we could bring out each individual juror and ask them if  
18 anything you heard from Juror 5 would affect your ability to  
19 continue deliberations.

20 THE COURT: Mr. Henderson.

21 MR. HENDERSON: Your Honor, based on what he --  
22 based on what he indicated, I would -- I would agree that  
23 it's of a technical nature, but at this point, I don't see  
24 any reason why we can't proceed with the deliberations.

25 THE COURT: Yeah, I would concur with Counsel. I

## JURY QUESTION

1 believe it was an unfortunate but inadvertent statement. I  
2 don't see where it prejudices the defendant, Mr. Diaz.  
3 Doesn't say there was one on 96th, or wasn't, or that he  
4 went in it. And it sounds like he's -- and I'm not sure  
5 exactly what orders were given, but it doesn't sound like he  
6 intentionally violated the Court's order in this case.

7 So I'm going to find that there is not prejudice,  
8 and why don't we -- I'm going to bring out the presiding  
9 juror and ask her to continue deliberations.

10 MR. HARLASS: Does the Court want to instruct them  
11 to disregard what Juror 5 said and re-read them the  
12 instruction that they should not be investigating the case  
13 on their own, in an abundance of caution?

14 THE COURT: Any objection to that procedure?

15 MR. HENDERSON: I wrote down exactly what he said.  
16 I don't have any problem with that, Your Honor.

17 THE COURT: Okay. Why don't we bring them out,  
18 and we'll advise them.

19 (Jury present 10:51 a.m.)

20 Jurors, I wanted to bring you out and raise a  
21 couple of issues. First, I'm going to ask that as soon as  
22 we break here, that you go back in and continue your  
23 deliberations.

24 Second, I want to remind everybody that even  
25 though you're not sequestered during this trial -- in some

## JURY QUESTION

1 trials jurors are ordered to stay at a hotel or the Olympic  
2 Four Seasons in Seattle, or for the duration of trial, or  
3 whatever, but we're not sequestering. We allow you to  
4 separate every day. And there are particular orders that go  
5 with that ruling. One is that you're to avoid any  
6 inadvertent contact with anyone who may be a witness in this  
7 case, and you, as jurors, should never seek out evidence on  
8 your own. You should not inspect the scene of an event  
9 involved in a case, as conditions may not be the same, and  
10 there are many other reasons why the case must be decided  
11 solely on proper evidence admitted in court and testimony  
12 from the witness stand. We want to make sure everyone is on  
13 the same level playing field. And so that's the important  
14 reason that we have those rules.

15 Finally, I'm going to ask that if your normal  
16 comings and goings require you to go by a location that has  
17 been referenced in this case -- and I don't know what  
18 they've all been. Please let the judicial assistant,  
19 Ms. Tufts, know, and if possible, take an alternate route  
20 because we don't want people inadvertently observing,  
21 investigating, or anything like that. We want to make sure  
22 that you all remain on the same level playing field. Okay?

23 Thank you very much, and you're adjourned back to  
24 the jury room.

25 (Jury absent 10:56 a.m.) (Off the record)

## JURY QUESTION

1 (Jury Question 4:04 p.m.)

2 MR. HARLASS: State of Washington v. Adam Diaz,  
3 15-1-01288-8, Scott Harlass for the State. Defendant is in  
4 custody with his counsel, Mr. Henderson. The jury has sent  
5 out a question/statement. I'll defer to Counsel.

6 THE COURT: The -- Mr. Henderson, Mr. Harlass, the  
7 jury question indicates:

8 We've reached a verdict on five counts  
9 but are at a stalemate on one. What is the  
10 procedure?

11 I'll hear from Counsel. What I'm inclined to do  
12 is bring the jury out and ask them without -- ask the  
13 presiding juror to not tell us how the parties -- how folks  
14 have voted, but to ask her whether there is a possibility, a  
15 reasonable possibility for the jury to reach a verdict on  
16 the remaining count within a reasonable period of time.

17 MR. HENDERSON: We're in agreement, Your Honor.

18 THE COURT: Then we can talk about it.

19 MR. HARLASS: Would the Court like to find out  
20 which count they're hung up on, or does that matter to the  
21 Court?

22 THE COURT: No, it doesn't.

23 MR. HARLASS: And I'm fine either way, Your Honor.

24 THE COURT: Do you want me to poll the jury,  
25 because I can poll them also?

## JURY QUESTION

1 MR. HARLASS: I'm fine either way, Your Honor. I  
2 know there's the standard WPICs, but I'll defer to the  
3 Court.

4 THE COURT: I'll ask the presiding juror.

5 (Jury present 4:05 p.m.)

6 Good afternoon. I received a letter from the -- a  
7 note from the presiding juror indicating that jurors have  
8 reached a verdict on five counts, but are at a stalemate on  
9 one, and at this time, I want to inquire of Juror No. 4,  
10 presiding juror. I'm going to ask that, as usual, that you  
11 not mention or not discuss how any votes have gone or what  
12 the vote is on the remaining count.

13 JUROR NO. 4: Yes, there is.

14 THE COURT: And my question is: Is there a  
15 reasonable possibility of the jury reaching a verdict on the  
16 remaining count in a reasonable amount of time?

17 JUROR NO. 4: No.

18 THE COURT: Okay. At this time, I'm going to poll  
19 the jury, and I'm going to pose the same question. I'll ask  
20 you not to discuss who has voted how, what the vote is. I'm  
21 going to start with Juror No. 1.

22 Do you believe that the jury will be able to reach  
23 a verdict on the remaining count within a reasonable time?

24 JUROR NO. 1: No.

25 THE COURT: Juror 2, same question.

## JURY QUESTION

1 JUROR NO. 2: No.  
2 THE COURT: Juror 3?  
3 JUROR NO. 3: No.  
4 THE COURT: Juror 5?  
5 JUROR NO. 5: No.  
6 THE COURT: Juror 6?  
7 JUROR NO.6: No.  
8 THE COURT: Juror 7?  
9 JUROR NO. 7: No.  
10 THE COURT: Juror 8?  
11 JUROR NO. 8: No.  
12 THE COURT: Juror 9?  
13 JUROR NO. 9: No.  
14 THE COURT: Juror 10?  
15 JUROR NO. 10: No.  
16 THE COURT: Juror 11?  
17 JUROR NO. 11: No.  
18 THE COURT: Juror 13?  
19 (No response)  
20 Juror 14?  
21 JUROR NO. 14: No.  
22 THE COURT: At this time, I'm going to ask you to  
23 return to the jury room, and I'll discuss the responses with  
24 the lawyers. Thank you very much.  
25 (Jury absent 4:07 p.m.)

## JURY QUESTION

1 I have some questions, and then I'll hear from  
2 Counsel. One is, how long was testimony in this case?

3 MR. HENDERSON: We started testimony Monday the  
4 27th. We went pretty much all day that day, up until, I  
5 think, about maybe 2:30, 3:00. We came back on the 29th,  
6 went pretty much all day that day, as well, up until  
7 about -- no, actually, I'm wrong. We picked the jury on the  
8 23rd. We didn't start openings until 3:30 on Monday.

9 THE COURT: The 27th?

10 MR. HENDERSON: Yes, I'm sorry. I was wrong.

11 THE COURT: And you ran all through last week?

12 MR. HENDERSON: We went through most of the  
13 testimony on Wednesday, all day, and then a little bit of  
14 testimony this past yesterday morning.

15 THE COURT: So it was Monday, Wednesday, and part  
16 of Monday.

17 MR. HENDERSON: And, actually, just testimony  
18 Wednesday and part of Monday because we didn't start 'til  
19 really late Monday afternoon on the 27th. All we did was  
20 opening statements.

21 MR. HARLASS: That's correct, Your Honor.

22 THE COURT: So it was really a day-and-a-half of  
23 testimony.

24 MR. HARLASS: That's correct, Your Honor.

25 THE COURT: Okay. About how many exhibits?

## JURY QUESTION

1 MR. HARLASS: There was quite a bit, quite a  
2 number of exhibits, Your Honor.

3 MR. HENDERSON: Maybe a total of 18, maybe.

4 THE JUDICIAL ASSISTANT: I believe 22.

5 THE COURT: 18 or 22, in that range. Okay.

6 Can I see the exhibit list, please?

7 (Document handed to the Court)

8 Is there a motion?

9 MR. HARLASS: Not by the State, Your Honor.

10 MR. HENDERSON: One moment, Your Honor. (Pause.)

11 Your Honor, I would -- initially, I was going to  
12 ask the Court to have them -- see if they can work it out,  
13 come back tomorrow morning. I'm still of that mindset. I'm  
14 a little bit concerned that after polling them, none of them  
15 believe they can reach a verdict in a reasonable amount of  
16 time. I would still move that we come back in the morning,  
17 maybe give them another crack at it, and see where we stand.  
18 I don't know what the State's position is.

19 THE COURT: Mr. Harlass.

20 MR. HARLASS: Your Honor, I realize they've been  
21 deliberating for about as long as the testimony took to put  
22 on. They got this case about 11:30 yesterday, and I don't  
23 know if they did deliberate at all yesterday morning, or  
24 whether they started at 1:30. So they've had it about a  
25 day-and-a-half.



## JURY QUESTION

1 I'm not opposed to having them come back after  
2 this evening, coming back tomorrow morning to try to figure  
3 it out, but at the same time, I do understand all 12 of them  
4 said "no."

5 THE COURT: Okay. Thanks.

6 I'm going to take a brief recess and think about  
7 it. I am concerned that there is no reasonable probability  
8 of them reaching a verdict on that last count. They seem  
9 really frustrated and tired, and the little bit I know about  
10 this case is it's a pretty straightforward case. I mean,  
11 this isn't the French connection. And so it also seems, at  
12 least at first blush, that they've had adequate time to  
13 deliberate, but I'm going to take a brief recess, do a  
14 little research, then I'll come right back.

15 Thank you.

16 (Recess 4:16 p.m.) (Back on the record 4:20 p.m.)

17 Counsel and Mr. Diaz, at this time, I've had an  
18 opportunity to review the exhibit list and some other  
19 background information on the case. I've answered, I  
20 believe, three questions earlier today from the jury --  
21 well, two questions, and there was another situation with  
22 Juror 5 which we got cleared away today.

23 I've polled the jury, and I believe that the jury  
24 is hopelessly deadlocked, and I don't believe, based on  
25 their representation, that they're going to be able to reach

## JURY QUESTION

1 a verdict on the one additional count. They've reached a  
2 verdict on five counts, so they have, I believe, fleshed  
3 through the evidence thoroughly.

4 So, at this time, I'm going to ask -- I'll hear  
5 from Counsel, but I'm going to ask the presiding juror to  
6 complete the verdict forms, and then we'll bring them back  
7 into court to deliver their verdicts.

8 MR. HARLASS: And the State understands the  
9 Court's ruling, and I'll defer to the Court.

10 MR. HENDERSON: We understand the Court's ruling,  
11 Your Honor. We've talked about it.

12 THE COURT: Thank you.

13 We'll start with the presiding juror. She may  
14 have already filled out the forms. If not, I'm going to ask  
15 her to fill out the forms, so just bring her out.

16 (Presiding Juror present)

17 You never thought you'd be this popular.

18 JUROR NO. 4: No. I really like you guys, and  
19 it's cooler in here.

20 THE COURT: People stand up when you come in the  
21 room. They won't do that at home tonight.

22 JUROR NO. 4: No, they won't, and I appreciate  
23 that.

24 THE COURT: I'm going to ask you to please fill  
25 out all of the verdict forms that you've completed.

## VERDICT

1 JUROR NO. 4: They're already done.

2 THE COURT: Well, with that said, then we are  
3 going to -- I'm going to ask you to get the forms, and we  
4 will usher you back into court in just a minute when  
5 everybody's ready.

6 (Juror 4 exits the courtroom)

7 (Jury present 4:24 p.m.)

8 The presiding juror has, at this time, provided  
9 the Court with the verdict forms. Mr. Henderson, Mr. Diaz,  
10 do you want to stand, please?

11 As to Count I, the crime of Possessing Stolen  
12 Property in the First Degree, the jury did not reach a  
13 verdict.

14 As to Count II, the crime of Criminal Trespass in  
15 the First Degree, the jury finds the defendant not guilty on  
16 Count II.

17 On Count III, Criminal Trespass in the First  
18 Degree as charged in Count III, the jury finds the  
19 defendant, Adam Diaz, guilty of Criminal Trespass in the  
20 First Degree in Count III.

21 As to Count IV, Criminal Trespass in the First  
22 Degree, the jury finds the defendant, Adam Diaz, guilty of  
23 Count IV, Criminal Trespass in the First Degree.

24 As to Count V, Driving with a Suspended License or  
25 Revoked License in the First Degree, jury finds the

## VERDICT

1 defendant, Adam Diaz, guilty of Driving with a License  
2 Suspended or Revoked in the First Degree.

3 And as to Count VI, Failure to have an Ignition  
4 Interlock Device, the jury finds the defendant, Adam Diaz,  
5 guilty of Failing to have an Ignition Interlock Device as  
6 charged in Count VI.

7 Thank you. You can be seated.

8 Jurors, I want to thank you for your service as  
9 jurors in this case. I know that you've kind of been here  
10 for a while, on and off, for -- since, I guess, a week ago  
11 Monday or something like that, so this is -- and on behalf  
12 of the parties, both the State and the Defense, I want to  
13 thank you for answering your jury summons and being here.

14 This is tough work, but it really is important.  
15 What you've done is at the heart of our justice system and  
16 our democratic circles, the fact that citizens are willing  
17 to come in for \$10 a day and struggle with each other to try  
18 to find the right answers, listen to evidence, and make a  
19 determination based on the facts and the law, so we really  
20 appreciate it.

21 I also hope that as difficult as I know it is,  
22 that it was a good experience. It's one of the unique  
23 opportunities that you're going to have to work with people  
24 that you don't know from other parts of town, and learn from  
25 people and about other folks. And so, again, I hope it was

## VERDICT

1 a good experience, and I hope you'll encourage your  
2 neighbors and friends to answer their summons when they are  
3 asked to come in and serve.

4 At this time, you're adjourned to the jury room.  
5 Ms. Tufts will be back there and tell you what to do next.  
6 And, again, thank you all very much.

7 (Jury absent 4:25 p.m.)

8 Mr. Diaz is convicted on Counts III, IV, V and VI.  
9 At this time, I'd like to talk about sentencing dates and  
10 conditions to be imposed pending sentencing.

11 MR. HARLASS: I'm not sure what Judge van  
12 Doorninck's schedule is like. I know she's going to be gone  
13 for quite a number of weeks, but whatever the first  
14 available date is --

15 THE COURT: We'd like to do it on the morning of  
16 the 21st, 11:00, and that's within the speedy sentencing  
17 guidelines.

18 Mr. Harlass, what conditions have been imposed on  
19 Mr. Diaz pending trial?

20 MR. HARLASS: Bail was originally set and,  
21 obviously, the felony counts, Count I, which they hung on  
22 bail, was originally set at \$60,000. He posted -- the short  
23 of the story is we spent all day Monday of last week trying  
24 to get Mr. Diaz in here. He was late. He's been late twice  
25 in the pretrial stages of this case. At one point a warrant

## VERDICT

1 was issued for his arrest, and then we had to quash it. He  
2 was tardy, I believe, on the Thursday afternoon, and Judge  
3 van Doorninck had warned him not to be late again. Come  
4 Monday, he didn't show up until after 10 when a bench  
5 warrant had already been issued. He was told to come back  
6 by 1. He didn't show up until after 2. Once he was here,  
7 he was with his child. It was part of the intention that he  
8 was going to be taken into custody at that point.

9 THE COURT: I'm sorry?

10 MR. HARLASS: Judge van Doorninck had told him he  
11 was going to be taken into custody if he was late again, so  
12 he was going to be taken into custody.

13 THE COURT: But he wasn't because --

14 MR. HARLASS: Because he left the courthouse. And  
15 court security had to pull him out of the driver seat of his  
16 vehicle, where he was then placed under arrest and brought  
17 back to the courtroom where Judge van Doorninck set bail at  
18 \$1 million.

19 THE COURT: Mr. Henderson.

20 MR. HENDERSON: Your Honor, much of what was said  
21 is true, in terms of him being late. What we -- on the day  
22 we were supposed to start the trial, which was the day we  
23 didn't start until late in the afternoon, as we did indicate  
24 to Judge van Doorninck, Mr. Diaz indicated that he was at  
25 the hospital with his daughter. He showed up at 10. He

## VERDICT

1 then went back -- he indicated that he then went back to the  
2 hospital. There was no one to be with her at that time so  
3 that he could be here on time, and that was the choice that  
4 he was faced with. He did subsequently leave the hospital  
5 with her, brought her here.

6 We -- he wanted to make arrangements for her  
7 mother to pick her up, and it's my understanding those  
8 arrangements were being made. I never got the impression  
9 that Mr. Diaz was attempting to leave. He was certainly not  
10 told to remain in the courtroom, and that much was made  
11 clear by the Court. It was my understanding that his  
12 intention was to make arrangements shortly before --

13 THE COURT: So I'm completely unclear now. You're  
14 saying that on one of these days he was with his daughter at  
15 a medical appointment or at the hospital?

16 MR. HENDERSON: Yes. That's what he's indicated  
17 to me.

18 THE COURT: That he brought her here?

19 MR. HENDERSON: That's correct.

20 THE COURT: That he came to the courtroom with  
21 her?

22 MR. HENDERSON: That's correct.

23 THE COURT: And tell me about the incident that  
24 Mr. Harlass is talking about where he leaves --

25 MR. HENDERSON: That's what we're talking about

## VERDICT

1 right now, so -- one second, Your Honor.

2 (Counsel and client confer off the record)

3 So that day he showed up with his daughter -- and  
4 I've obtained Mr. Diaz's permission to tell the Court  
5 this -- we were trying to figure out what we were going to  
6 do in terms of his daughter being here and the situation  
7 that he found himself in. Mr. Diaz told me that he needed  
8 to find a telephone so that he could make arrangements for  
9 his daughter, and that's what I believe that he was doing.  
10 I believe that's still what he did.

11 When the police officers came, they did  
12 subsequently go out to the Pierce County -- I think it was  
13 the Pierce County Library, and at that point -- I have since  
14 also spoken to his daughter's mother; it was her  
15 intention -- it was their intention for her to be there to  
16 meet them there so he could then return back into the  
17 courtroom without his daughter.

18 When I did speak to the officer, he did indicate  
19 that when they saw Mr. Diaz, he was not -- he wasn't  
20 running, of course, from the courtroom, he was walking on  
21 the sidewalk.

22 You know, given -- and I know Judge van  
23 Doorninck's intention. I know she was very frustrated with  
24 him being late. I honestly do not feel this is a situation  
25 where Mr. Diaz was trying to escape for some reason, but I



## VERDICT

1 do think it was very apparent that Judge van Doorninck  
2 values punctuality, as do we all, of course, and definitely  
3 wanted to make sure that there was no possible way that he  
4 would ever be late again. And that, of course, has  
5 definitely occurred.

6           Given the outcome of today, Your Honor, I think a  
7 million dollars on misdemeanors, Your Honor, is excessive.  
8 I would ask the Court to reinstate his original bond of  
9 \$60,000. He originally posted that. If the Court's not  
10 willing to do that but feels an increase is appropriate, I  
11 did previously propose -- I believe it was a \$70,000 bond.

12           MR. HARLASS: If I may respond, Your Honor?

13           I don't think I ever gave the Court a  
14 recommendation. I will let the Court know that medical  
15 documentation was attempted to be provided to Judge van  
16 Doorninck. She did not accept it as sufficient to explain  
17 his absence. Not only -- yes, I understand he was being  
18 convicted of the gross misdemeanors but, ultimately, the  
19 mistrial on the PSP-I starts us over again, so it may be  
20 better to address conditions on this cause number as a  
21 whole, instead of parsing out each individual count because  
22 we will need to set new pretrial dates and trial dates as  
23 well.

24           I'll let the Court know that Mr. Diaz, as I  
25 previously stated, has been habitually late, and him being

## VERDICT

1 pulled from his vehicle, and not being here when he was  
2 supposed to be here, and the million-dollar bail speaks to  
3 his questionable return to future court dates. He is  
4 pending revocation of 25 months on a DOSA sentence right now  
5 that he originally had entered into -- he had pled to  
6 January 2014.

7 I would ask if there's going to be any change of  
8 conditions, that we would defer to Judge van Doorninck to  
9 make that determination, to keep her original conditions of  
10 release current at this time, and note up a bail hearing at  
11 some future point. If the Court's not willing to do that, I  
12 would ask the Court to do bail on this cause number across  
13 the board \$500,000.

14 MR. HENDERSON: Court could also make it a  
15 condition of his release that he be on electronic home  
16 monitoring as well.

17 THE COURT: I'm going to set bail at \$100,000.  
18 Other standard conditions apply.

19 Need to be here on the 11th, on time.

20 THE JUDICIAL ASSISTANT: The 21st.

21 THE COURT: On our sentencing date, the 21st.

22 MR. HENDERSON: Is it 14 days in custody, 21 out  
23 or --

24 MR. HARLASS: Are you talking about speedy  
25 sentencing?

## VERDICT

1 THE COURT: 40.

2 MR. HENDERSON: I'm sorry?

3 MR. HARLASS: For the record, is the Court  
4 finding -- declaring a mistrial as to Count I?

5 THE COURT: As to Count I.

6

7 (Whereupon, the above-held proceedings were  
8 concluded at 4:41 p.m.)

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IN THE SUPERIOR COURT IN AND FOR THE COUNTY OF PIERCE  
STATE OF WASHINGTON

---

STATE OF WASHINGTON,	)	Court of Appeals
Plaintiff,	)	No. 48821-3-II
v.	)	
ADAM DIAZ,	)	Superior Court
Defendant.	)	No. 15-1-01288-8
	)	C E R T I F I C A T E

---

STATE OF WASHINGTON )  
COUNTY OF PIERCE ) ss

I, Ann Marie G. Allison, Official Court Reporter  
for the State of Washington, County of Pierce, do hereby  
certify that the foregoing transcript is a full, true and  
accurate transcript of the proceedings and testimony taken  
in the matter of the above-entitled cause.

---

Ann Marie G. Allison, RPR  
Official Court Reporter  
Pierce County Superior Court  
Tacoma, Washington

# PIERCE COUNTY PROSECUTOR

**January 20, 2017 - 3:42 PM**

## Transmittal Letter

Document Uploaded: 2-488213-Respondent's Brief.pdf

Case Name: State v. Diaz

Court of Appeals Case Number: 48821-3

**Is this a Personal Restraint Petition?** Yes ☐ No ☒

### The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

☒ Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### Comments:

No Comments were entered.

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